

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	CG Docket # 02-278
Petition for Waiver of)	CG Docket # 05-338
BIG HAIRY DOG INFORMATION)	
SYSTEMS and RETAIL PRO)	
INTERNATIONAL, LLC)	
)	

PETITION FOR WAIVER

Big Hairy Dog Information Systems, Inc. ("BHD") and Retail Pro International, LLC ("RPI"), through their undersigned counsel, and under section 1.3 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. § 1.3, and the Commission's October 30, 2014, Waiver Order in the above-referenced dockets¹, respectfully request that the Commission grant BHD and RPI a retroactive waiver of the opt-out requirement set forth in sections 64.1200(a)(4)(iii)-(iv)² from the effective date of the regulation for any facsimile sent by BHD and/or RPI to any person or entity who had provided prior express consent or permission to send them facsimile communications.

In the *Waiver Order*, the Commission found good cause existed to grant individual retroactive waivers of the facsimile opt-out requirement in section 64.1200(a)(4), and invited

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278; Junk Fax Prevention Act of 2005, Application for Review filed by Anda, Inc., Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission, CG Docket No. 05-338, FCC 14-164 (rel. Oct. 30, 2014) (the "Waiver Order").*

² 47 C.F.R. § 64.1200(a)(4)(iv) ("A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.").

similarly situated entities to seek retroactive waivers of that rule. Like the petitioners in the *Waiver Order*, BHD transmitted facsimiles with the prior express consent or permission of the recipients. Some of these facsimiles contained information about RPI and/or RPI trademarks. BHD and RPI have been sued in a putative class action related to facsimiles advertising RPI, and are at risk of incurring significant monetary damages, because such facsimiles while containing opt out provisions did not contain the specific opt-out language as set forth in the Commission's rules. BHD now includes the specified opt-out language on all facsimile advertisements sent with express consent. Accordingly, and as demonstrated below, good cause exists to grant BHD and RPI a retroactive waiver of sections 64.1200(a)(4)(iii)-(iv) for each of the facsimile advertisements transmitted with the prior express consent or permission of the recipient.

I. FACTUAL BACKGROUND

BHD is a leading technology help desk for independent retail businesses. For 22 years BHD has assisted retail stores to better manage their in-store technology. Resources include implementation, training and ongoing sales and support. The core of BHD business is training and ongoing support while offering a plethora of solutions including software, hardware, network, credit card processing and ecommerce. Technology support includes help desk, onsite, email, chat room and message board. Most of the companies supported by BHD are small, independent retail stores dealing in sporting, clothing, shoes and hard goods. *See* Declaration of Sandra Malaney at ¶ 2 (Exhibit 1).

BHD communicates with its prospects and clientele via telephone, email, text messaging, message board and fax. *Id.* at ¶ 3 While many no longer have the need to receive or send facsimile communications, many retail stores continue to use fax communication with

their vendors and manufacturers. Sending purchase orders via fax is quite common in retail/wholesale/manufacturing. Most of BHD clients and non-clients have access to a fax machine. *Id.* at ¶ 4.

Most of the facsimile communications sent by BHD are instructive or informational. For example, recently a storm was forecasted by national media to hit Northern California (BHD's headquarter location) with predictions of statewide power outages. BHD staff felt it important to notify clients and non-clients of alternative forms of communication with BHD, in case power outages affected BHD. *Id.* at ¶ 5.

Most of BHD's contacts with prospective customers begin with a face-to-face meeting at a trade show, a referral from a BHD customer followed-up by a phone call, or an email or mailer response by the prospective customer. It is during these contacts that prospective customers typically provide BHD their fax number for the purpose of receiving commercial facsimiles from BHD. *Id.* at ¶ 6; *See e.g.* Information Request Card (attached as Exhibit A to Malaney Declaration).

It is BHD's practice to document communications with prospective customers in the BHD Customer Relationship Management ("CRM") database. Prospective customers are categorized into "A" "B" & "C" groups based upon their level of interest in a BHD solution. BHD has used and continues to use facsimiles to communicate with customers and prospects with which it has an existing business relationship and that have expressly consented to receive commercial facsimile communications from BHD. Many of these communications are not advertisements at all, but comprise general or technical information. Malaney Declaration at ¶ 7.

RPI products are one of the brands carried by BHD. RPI trademarks or information about RPI products are sometimes included in BHD's facsimile communications. RPI did not and does not direct or control BHD's facsimile communications and until this lawsuit BHD did not specifically inform RPI that BHD was including information about RPI in some of its facsimile communications, although BHD believes it had the right to do so as an authorized reseller of RPI. Malaney Declaration at ¶ 8 (Exhibit 1).

BHD does not fax advertisements to customers or potential customers who have not expressly provided prior consent or permission for BHD to send them. *Id.* at ¶ 9. Nevertheless, a purported class action lawsuit has been filed against BHD and RPI for alleged violations of the Telephone Consumer Protection Act ("TCPA") and the Commission's implementing regulations. The allegations are that BHD and RPI sent facsimile advertisements to the plaintiff and others without their consent and that the opt-out information in the facsimile did not comply with FCC requirements. *See Barron's Outfitters Inc v. Big Hairy Dog Information Systems et al.*, 3:14-cv-04335-TLW (USDC SC) (DKT. #1).

RPI is a global leader in Point of Sale, Store Operations, and Back-Office software applications for the specialty retail industry. RPI's authorized software resellers provide local training, service, support, and regulatory compliance for its customers. BHD is one of RPI's authorized resellers. *See Declaration of Kerry Lemos at ¶ 2 (Exhibit 2).*

RPI does not itself use facsimile communications to advertise its products to potential end-users and on information and belief has not done so in the past 5 years. RPI has not asked any reseller to use facsimile advertising to market RPI products within the past 5 years. RPI was unaware until December of 2014 that BHD occasionally used RPI trademarks in facsimile communications to customers and prospective customers. *Id.* at ¶¶ 5, 6, 7.

RPI has not and does not, review, approve, direct, or otherwise control the marketing efforts of BHD. BHD's agreement with RPI requires BHD to comply with the law when marketing RPI products and services BHD has informed RPI that it only sent facsimile advertisements to prospective customers who have expressly provided their consent to receive commercial facsimiles. *See* Declaration of Kerry Lemos at ¶¶ 8, 9 (Exhibit 2).

II. GOOD CAUSE EXISTS TO GRANT A RETROACTIVE WAIVER OF THE OPT-OUT REQUIREMENT TO BHD AND RPI

Good cause exists to grant BHD and RPI a retroactive waiver of the opt-out language requirement in section 64.1200(a)(4)(iii)-(iv). The Commission has the authority to waive any rule for good cause shown.³ The Commission has found that good cause exists if “(1) special circumstances warrant a deviation from the general rule; and (2) the waiver would better serve the public interest than would application of the rule.”⁴

In the *Waiver Order*, the Commission granted retroactive waivers to numerous petitioners of the opt-out requirement in sections 64.1200(a)(4)(iii)-(iv). Specifically, the Commission granted a retroactive waiver of the requirement that faxes sent with the express permission of the recipient contain the precise opt-out language as mandated by section 64.1200 of the Commission's rules. In doing so, the Commission concluded that special circumstances existed to warrant deviation from the rule: specifically, the Commission found that an inconsistency between a footnote in the *Junk Fax Order*,⁵ which explicitly stated that

³ 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”). *Waiver Order*, at para. 22 (citing 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)).

⁴ *Waiver Order*, at para. 23.

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk*

"the opt-out notice requirement only applies to communications that constitute unsolicited advertisements,"⁶ and the text of the opt-out rule caused confusion regarding whether the opt-out requirement applied to facsimiles sent *at the request of the recipient*.⁷ The Commission also concluded that granting a retroactive waiver would serve the public interest, finding that strict application of the rule could subject "parties to potentially substantial damages, as well as possible liability for forfeitures under the Communications Act."⁸ Therefore, on balance, the Commission concluded that confusion regarding the rule warrants relief from potentially substantial consequences. The Commission also invited other parties affected by the confusion in the rules to seek similar retroactive waivers.⁹

Good cause also exists to grant BHD and RPI a retroactive waiver of the opt-out language requirement in the Commission's rules. The same special circumstances found in the *Waiver Order*- the inconsistency between the footnote in the *Junk Fax Order* and the text of the rule, as applied to *solicited facsimiles*- warrant a deviation from the general rule satisfying the first prong of the good cause standard. As previously attested, BHD only sent facsimiles where it had express consent from the recipient to do so. RPI was only involved in facsimile advertising to the extent that BHD sometimes used their trademarks in such advertising. Under the circumstances, due to the conflicting language between the footnote in the *Junk Fax Order* and the Commission rule, special circumstances exist for the Commission to grant a retroactive waiver of the opt-out requirement to BHD and RPI for all facsimile communications sent by BHD to customers that had consented to receive such communications.

Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, at note 154 (2006) ("*Junk Fax Order*").

⁶ *Id.*

⁷ *Id.* at para. 24.

⁸ *Id.* at para. 27.

⁹ *Id.* at para. 30.

It is also in the public interest for the Commission to grant to BHD and RPI a retroactive waiver of sections 64.1200(a)(4)(iii)-(iv). BHD and RPI are together facing a lawsuit where the plaintiff seeks to pursue substantial remedies for itself and a putative class based on alleged non-compliance with the facsimile opt-out provisions. Absent the waiver, as the Commission has recognized, BHD and RPI could face significant fines and penalties under the TCPA simply because they did not include the precise opt-out language required by the Commission. In contrast, by definition Plaintiffs to the litigation will suffer no harm if a waiver is granted because the waiver requested only applies to recipients that expressly consented to receive commercial facsimiles. Moreover, since being named in the class action, BHD has conformed its facsimile opt-out language to the Commission's rules. Applying a strict interpretation of the opt-out rules to BHD and RPI in this case, when BHD sent facsimiles with express consent from the recipients to do so, and given the confusion surrounding the opt-out requirements acknowledged by the FCC, would be unjust and inequitable, and contrary to the public interest. It is, therefore, in the public interest to grant BHD and RPI the requested retroactive waiver.

Since special circumstances are present to justify a waiver of the rule, and the public interest would be served by waiving the rule, BHD and RPI have demonstrated that good cause exists to grant them a retroactive waiver of the opt-out requirement for facsimiles set forth in section 64.1200 of the Commission's rules.

III. CONCLUSION

For the foregoing reasons, BHD and RPI respectfully request that the Commission grant them a retroactive waiver of the facsimile opt-out requirements set forth in sections

64.1200(a)(4)(iii)-(iv) for those recipients of facsimiles from BHD and RPI that have provided consent to receive such facsimiles.

Respectfully submitted,

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March 12, 2015

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	CG Docket # 02-278
Petition for Waiver of)	CG Docket # 05-338
BIG HAIRY DOG INFORMATION)	
SYSTEMS and RETAIL PRO)	
INTERNATIONAL, LLC,)	

**DECLARATION OF SANDRA L. MALANEY IN SUPPORT OF PETITION FOR
WAIVER**


Sandra L. Malaney, hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746 that:

1. I am employed by Big Hairy Dog Information Systems, Inc. ("BHD") as its Chief Executive Officer and provide the following information of my personal knowledge.
2. BHD is a leading technology help desk for independent retail businesses. For 22 years BHD has assisted retail stores to better manage their in-store technology. Resources include implementation, training and ongoing sales and support. The core of BHD business is training and ongoing support while offering a plethora of solutions including software, hardware, network, credit card processing and ecommerce. Technology support includes help desk, onsite, email, chat room and message board. Most of the companies supported by BHD are small, independent retail stores dealing in sporting, clothing, shoes and hard goods.
3. BHD communicates with its prospects and clientele via telephone, email, text messaging, message board and fax.
4. While many no longer use fax communications, it is not uncommon for retail stores to use fax communications with their vendors and manufacturers. For example, sending purchase orders via fax is quite common in retail/wholesale/manufacturing. Most of BHD clients and non-clients have access to a fax machine.
5. Many if not most of the facsimile communications sent by BHD are instructive or informational and are not advertisements. For example, recently a storm was forecasted by national media to hit Northern California (BHD's headquarter location) with predictions of statewide power outages. BHD staff felt it important to notify clients and non-clients of alternative forms of communication with BHD, in case power outages affected BHD.



6. Most of BHD's contacts with prospective customers begin with a face-to-face meeting at a trade show, a referral from a BHD customer followed-up by a phone call, or an email or mailer response by the prospective customer. It is during these contacts that prospective customers typically provide BHD their fax number for the purpose of receiving commercial facsimiles from BHD. *See e.g.* Information Request Card attached as Exhibit A.
7. It is BHD's practice to document communications with prospective customers in the BHD CRM database. Prospective customers are categorized into "A" "B" & "C" groups based upon their level of interest in a BHD solution. BHD has used and continues to use facsimiles to communicate with customers and prospects with which it has an existing business relationship and that have expressly consented to receive commercial facsimile communications from BHD. Many of these communications are not advertisements at all, but comprise general or technical information of interest to BHD's customers and potential customers.
8. Retail Pro International, LLC ("RPI") products are one of the brands carried by BHD, RPI trademarks or information about RPI products are sometimes included in BHD's facsimile communications. RPI did not and does not direct or control BHD's facsimile communications and until this lawsuit BHD did not specifically inform RPI that BHD was including information about RPI in some of its facsimile communications, although BHD believes it had the right to do so as an authorized reseller of RPI.
9. BHD does not fax advertisements to customers or potential customers who have not expressly provided prior consent or permission for BHD to send them. Prior to November of 2014, where facsimile communications that might reasonably be construed as advertising were used, BHD is clearly identified as the sender of the facsimile and a toll free general contact number and a separate toll free number to "unsubscribe" from receiving future faxes were provided.
10. Any fax advertising currently sent by BHD contains opt-out information in compliance with FCC regulations.

I declare under Penalty of perjury that the foregoing is true and correct. Executed on
March 11, 2014.


Sandra L. Malamey



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www.bighairydog.com
1-800-377-7776

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EXHIBIT

A

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition for Waiver of
BIG HAIRY DOG INFORMATION
SYSTEMS and RETAIL PRO
INTERNATIONAL, LLC,

)
) CG Docket # 02-278
) CG Docket # 05-338
)
)
)

DECLARATION OF KERRY LEMOS IN SUPPORT OF PETITION FOR WAIVER

KERRY LEMOS, hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746

that:

1. I am employed by Retail Pro International, LLC ("RPI") as its Chief Executive Officer and provide the following information of my personal knowledge.
2. RPI is a global leader in Point of Sale, Store Operations, and Back-Office software applications for the specialty retail industry. For over 25 years, we have economized retail business processes to give our customers more time to focus on what really matters - building relationships with patrons, employees, vendors, and trends.
3. Our uniquely flexible, extensible, and scalable retail management solutions empower our customers to retail their way. We provide fully integrated front and back-office functionality for a client's stores, warehouses, and headquarters into a single software solution. RPI is a trusted solution for retailers of all sizes - from owner-operated brick and mortar specialty stores up to large corporate-run retail chains, and nearly all flavors of specialty retail in between.
4. RPI's authorized software resellers provide local training, service, support, and regulatory compliance for our customers. Big Hairy Dog Information Systems, Inc. ("BHD") is one of RPI's authorized resellers.
5. RPI does not itself use facsimile communications to advertise its products to potential end-users and on information and belief has not done so in the past 5 years.
6. RPI has not asked any reseller to use facsimile advertising to market RPI products within the past 5 years.
7. RPI was unaware until December of 2014 that BHD occasionally used RPI trademarks in facsimile communications to customers and prospective customers.



8. RPI has not and does not, review, approve, direct, or otherwise control the marketing efforts of BHD.
9. BHD's agreement with RPI requires BHD to comply with the law when marketing RPI products and services.
10. BHD has informed RPI that it only sent facsimile advertisements to prospective customers who have expressly provided their consent to receive commercial facsimiles.
11. Since being named in the class action, we have been informed that BHD has revised their facsimile opt-out language to conform to the Commission's rules.

I declare under Penalty of perjury that the foregoing is true and correct. Executed on

MARCH 9, 2015.


KERRY DEMOS